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Supreme Court, U.S.
FILED

No. ___

04-921 JAN 4 - 2005

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IN THE

Supreme Court of the United States

BICYCLE COMPONENTS EXPRESS, INC.
d.b.a. SOLEUS

Petitioner,

v.

BRUNSWICK CORPORATION, BRUNSWICK BICYCLE,
and DOES 1-50,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner was deprived of Procedural and Substantive Due Process of Law under the Fourteenth Amendment when Petitioner had alleged in its Second Amended Complaint that it had *fully performed* its obligations pursuant to an oral contract with Respondents. The allegation is deemed *admitted* on Motions to Dismiss under Illinois §§ 2-619(a)(7) and § 2-615 when the trial court, affirmed by the Illinois Court of Appeal and the Supreme Court, resolved the question of fact that Petitioner had not *fully performed* its obligations under the contract, thereby resulting in the Complaint being dismissed as unenforceable under the statute of frauds.

2. Whether Petitioner was deprived of Procedural and Substantive Due Process of Law under the Fourteenth Amendment when Petitioner had alleged an existing partnership between the Petitioner and the Respondents in the Second Amended Complaint no less than 14 times and that the Petitioner *"expected a Special Relationship of Trust"* between the parties and when the Illinois courts ignored the fiduciary relationship and dismissed the Second Amended Complaint, denying that Respondents had a duty to disclose its business plans to the Petitioner.

3. Whether Petitioner was deprived of Procedural and Substantive Due Process of Law under the Fourteenth Amendment when the Illinois courts denied Petitioner the *liberty of contract* when the oral contract could have been entered into in California, in Taiwan, in Nevada, in Pennsylvania or in Mexico, and when it would have been a valid contract in any of those jurisdictions.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

STATEMENT PURSUANT TO RULE 29.6

Bicycle Component Express (BCE) is a privately-owned company. No publicly-held company owns 10% or more of any of Bicycle Component Express, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Illinois Supreme Court for a hearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2101, 2104, and 2106.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14, § 1.

STATEMENT OF THE CASE

Petitioner Bicycle Components Express, Inc., d/b/a Soleus ("BCE"), brought suit against Respondent Brunswick Corporation asserting causes of action for breach of contract, equitable estoppel, "quantum meruit and/or substantial performance," and "fraud and deceit."

Brunswick moved to dismiss BCE's three complaints in this matter through motions pursuant to 735 ILCS 5/2-619.1 ("Section 2-619.1") and 735 ILCS 5/2-615 ("Section 2-615"), the failure to state a claim and also on the basis that any purported oral agreement was unenforceable under the statute of frauds, pursuant to 735 ILCS 5/2-619(a)(7) ("Section 2-619(a)(7)").

Petitioner alleged that it had *"fully performed"* its obligations under the Oral Agreement, which allegation is deemed *"admitted"* under the Motions to Dismiss. When the Trial Court questioned that allegation by saying, "The question is, is this *full performance* . . . ," the Illinois Court was making a Finding of Fact that this was not "full performance," which, under Illinois law, is required to get around the Statute of Frauds. In addition, the Illinois courts ignored the allegations of a partnership (14 times) in the Second Amended Complaint and the resultant fiduciary relationship between the Petitioner and Brunswick Corporation. Respondent, therefore, had a duty "to disclose its business plans to [Petitioner]." (Issue No. 5, Respondent's Brief on Appeal, p. 2.)

Finally, Petitioner was deprived of its *"liberty of contract"* when the Illinois courts ruled against the oral contract and when it would have been considered a valid contract in every other possible jurisdiction. Petitioner was, therefore, deprived of his rights to due process under the Fourteenth Amendment on three separate grounds.

The Supreme Court of Illinois denied the Petition for Leave to Appeal on October 6, 2004.

ARGUMENT I

I. The Petitioner Has Alleged That It *"Fully Performed"* Its Obligations Under The Agreement Set Forth In The Second Amended Complaint. In Illinois, Motions To Dismiss Are Like Demurrers In California—The Allegation Is Deemed Admitted. Illinois Has Deprived Petitioner Of Procedural And Substantive Due Process Of Law By Dismissing The Second Amended Complaint As Being Unenforceable Under The Statute Of Frauds And For Failure To State A Claim

In paragraph 44 of the Second Amended Complaint, Petitioner alleges:

> "44. BCE *fully* performed under the agreement alleged in paragraphs 7-25 herein except for as may have been excused by the conduct of Brunswick." [1]

In ruling on Motions to Dismiss under Illinois sections 2-619(a)(7) and 2-615, *"the trial court should admit all well-pleaded facts as true."* [2] The above allegations as to *"full performance"* are, therefore, deemed *"admitted."*

As Brunswick's Brief on Appeal aptly states:

> *"Brunswick does not dispute that, in a proper case, full performance of an oral contract may justify the enforcement of an agreement that would otherwise be invalid under the statute of frauds. See, e.g., McInerney v Charter Golf, Inc., 176 Ill.2d 482, 491, 680 NE.2d 1347, 1352 (1997). "[A] party who has fully performed an oral contract within the one-year provision may nonetheless have the contract enforced." However, BCE has failed to allege full performance of its obligations under the agreement in the manner necessary to avail itself of*

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[1] Second Amended Complaint, p. 19.

[2] Brief on Appeal of Defendant/Appellee Brunswick Corporation, Standard of Review, p. 13.

this exception to the Statute of Frauds. The Trial Court agreed: "[T]he question is, is this full performance, and I have some real reservations saying that it is, because as I reviewed that, it was a long-term relationship, if you want to call it that, and it included building parts." [3] *(R.Tr. 25-26.)*

The allegation that Petitioner has *fully performed* its obligations pursuant to the Oral Agreement is deemed admitted. Despite the fact that these were Motions to Dismiss the Second Amended Complaint, the trial court made its own Finding of Fact that *"this was not 'full performance.'"* By affirming the Trial Court's holding, the Supreme Court and the Illinois Court of Appeal were denying Petitioner a hearing on that Question of Fact. That is a denial of procedural due process under the Fourteenth Amendment. It is also denial of substantive due process rights as to Petitioner's property rights, since the total property loss to Petitioner, as alleged in the Second Amended Complaint, was the sum of $7,643,323.00. [4]

ARGUMENT II

II. "The Prevailing Feeling Both In The Legal And Commercial World Is . . . That" The Statute Of Frauds Has "Outlived" [Its] "Usefulness, And" [Is] "Quite Out Of Place Amid The Changed Legal And Commercial Conditions Of Today." [5]

In footnote 3 of the *Sunset-Sternau* case, Justice Tobriner quotes Holdsworth as follows:

". . . The writer's study of the cases, above referred to, has fully convinced him as follows: 1. that belief in the

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[3] Brunswick Corporation's Brief on Appeal, p. 25-26.

[4] Petitioner's Second Amended Complaint, p. 12

[5] *Sunset-Sternav Food C. v Bonzi* (1964) 60 C.2d 834, 838, fn. 3, 36 Cal.Rptr. 741, Justice Tobriner wrote the majority opinion (6-1) and quotes Holdsworth; 6 Holdsworth, *History of English* Law (1924) 396.

> *certainty* and *uniformity* in the application of any presently existing statute of frauds is a *magnificent illusion*; 2. that fraudulent and perjured assertions of a contract are far less likely to be successful; 3. that from the very first, the requirement of a signed writing has been at odds with the established habits of men, a habit of *reliance* upon the spoken word in increasing millions of cases; 4. that when the courts enforce detailed formal requirements, they foster dishonest repudiation without preventing fraud; 5. that in innumerable cases the courts have *invented devices* by which to 'take the case out of the statute'; 6. that the decisions do not justify some of the rules laid down in the Restatement of Contracts to which the present writer assented some 20 years ago."

The correct date for the enactment of the Statute of Frauds is April 16, 1677. It comes to us from Great Britain and has been reenacted or adopted as a part of the common law by every state in the Union. [6]

"The original purpose for the enactment of the Statute of Frauds *was to prevent fraud caused by perjury*; . . ." [7] the original reasons for the enactment of the Statute of Frauds *"no longer exist because of the competency of parties to testify, the control exercised by the courts over the jury and changes . . . in the law of contracts . . .".* [8]

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[6] "The Statute of Frauds—A Legal Anachronism," Hugh Evander Willis, 3 *Indiana Law Journal* 427 (1928)

[7] *Ibid.*, p. 427.

[8] *Ibid.*, p. 540.

ARGUMENT III

III. Although The Statute Of Frauds Is Still Alive In Most Jurisdictions Of The United States, It Is Not *"Settled"* Law And Requires The Intervention Of This Court To Explain The Ambiguities, Resolve The Differences And To Protect The Plaintiff From The Denial Of Property Rights And The Denial Of Substantive Due Process Rights Under The Constitution

Respondent's Brief to the Illinois Supreme Court says the following:

> "Instead, this case involves straightforward application of *settled* law to these particular litigants . . ." [9]

The law is not *settled* in most jurisdictions, which conflict with other jurisdictions.

The question becomes: *Which law do we use?* Brunswick is a *Delaware* corporation headquartered in Lake Forest, *Illinois*. (Defendant-Appellee's Brief on Appeal, p. 4.) The plaintiff BCE is a *California* corporation.

The parties "engaged in a series of meetings in a variety of locales, including *Illinois*, *Taiwan, Nevada, Pennsylvania*, and *Mexico*." [10] The bicycle parts plant was built in Saltillo, México. [11] I don't believe that Taiwan or Mexico have ever even heard of the "Statute of Frauds."

But let's take *California* law versus *Illinois* law. Plaintiff could easily take the position that California law should be

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[9] Respondent's Brief to the Supreme Court, p. 16; the law on the statutes of frauds is hardly *"settled."* Not only has it been virtually repealed in Great Britain, but the *certainty* and the *uniformity* of its application in the United States is a *magnificent illusion*. *Sunset-Sternau Food Co. v Bonzi* (1964) 60 Cal.2d 834, fn 3, 36 CR 741.

[10] Defendant-Appellee's Brief on Appeal, p. 4.

[11] Ibid., p. 4.

applied since the plaintiff is a California corporation and since the Second Amended Complaint alleges that *"BCE did in fact invest in a manufacturing plant in Saltillo, Mexico, and built a new factory in Romos Arizoe, Mexico."* [12] Any written check paid toward that partial performance under the contract and any checks received by BCE toward the "vendor-partnership" would have been paid and cashed through plaintiff's main offices in California.

California law on the Statute of Frauds is set forth in *Sunset-Sternau Food Co. v. Bonzi.* [13] With an opinion by Justice Tobriner in a 6-1 decision by the California Supreme Court, *Sunset-Sternau* states:

> "We must, of course, apply the California statute of frauds to a situation which is previously covered by the language of the statute. If the extent of coverage is unclear, however, *we know of no policy reasons which compel a resolution of the ambiguity in favor of its wide application.*[3]" [14]

Illinois, on the other hand, adopts a *conflicting* position with California. In the same year that the *Sunset-Sternau* case was decided, 1964, the Illinois Appellate Court in *Sinclair v Sullivan* (1964) followed the Illinois Supreme Court in *Ozier et al. v. Haines,* [15] which said:

> ". . . the *moral wrong* of refusing to be bound by an agree-ment because it does not comply with the Statute of Frauds does not of itself authorize the application of

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[12] Second Amended Civil Complaint, paragraph 20, p. 10.

[13] *Sunset-Sternau Food Co. v. Bonzi* (1964) 60 Cal.2d 834, 36 C.R. 741.

[14] Ibid., p. 838. Footnote 3 begins: *"The commentators almost unanimously urge that considerations of policy indicate a restricted application of the statute of frauds, if not its total abolition."*

[15] *Sinclair v Sullivan Chevrolet Co.* (1964) 45 Ill.App.2d 10, 195 N.E.2d 250.

> the doctrine of estoppel, *for the breach of a promise which the law does not regard as binding is not a fraud.* . . . To hold otherwise would be to render the statute *entirely nugatory.*" [16]

The Illinois Court, in *Ozier*, also said:

> "To adopt such a view would render the Statute of Frauds useless and unmeaning. It is true that *harsh results* . . . may occur when one has *changed his position* in reliance on the oral promise of another, but it is a result which is *invited* and *risked* when the agreement is not reduced to writing in the manner prescribed by law . . . " [17]

ARGUMENT IV

IV. In An *American Law Review* Article Written In 1974, The Author Lists The Conflict Existing Among The Various States, I.E., That The Doctrine Of Promissory Estoppel May Be Used So That An Oral Agreement Becomes Enforceable Versus The Position That Promissory Estoppel May Not Be Used To Frustrate The Basic Policy Of The Statute Of Frauds

In footnote 59 of the *American Law Review* article on Promissory Estoppel, [18] the note says:

> ". . . it is apparent that whether or not promissory estoppel may defeat the statute of frauds, and if so, under what conditions it will do so, depends at least to some extent upon the *attitude of the various courts toward the statute of frauds as expressing a public policy.* There is an increasing tendency for some scholars and courts to

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[16] *Ozier v Haines*, 411 Ill. 160, 103 N.E.2d 485.

[17] *Ibid.*, 103 N.E.2d 488.

[18] "Promissory Estoppel as Basis For Avoidance of Statute of Frauds," Robert A. Brazener, 56 ALR3d 1037, 1052 (1974).

view the statute of frauds as an anachronism and no longer suitable . . . as a general rule of contracts." [19]

The article lists a number of cases as being in favor of the doctrine of promissory estoppel rendering the oral contract enforceable. [20] It also lists numerous cases where the general position is that promissory estoppel may not be used to frustrate the Statute of Frauds. [21] Note that some states have

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[19] *Ibid.*, p. 1052, fn. 59.

[20] **Alaska**—*Alaska Airlines, Inc. v. Stephenson* (1954, CA9 Alaska) 217 F2d 295 (applying Alaska territorial law). **Ariz**—*Tiffany, Inc., v W.M.K. Transit Mix, Inc.* (1972) 16 Ariz App 415, 493 P2d 1220, 56 ALR3d 1028. **Cal**—*Seymour v Oelrichs* (1909) 156 Cal 782, 106 P 88; *Sunset-Sternau Food Co v Bonzi* (1964) 60 Cal.2d 834, 36 C.R. 741. Although the American Law Review citation is dated in 1974, the *Sunset-Sternau* case was not included. **Nev**—*Harmon v Tanner Motor Tours, Ltd.* (1963) 79 Nev 4, 377 P2d 622. **Okla**—*Lacy v Wozencraft* (1940) 188 Okla 19, 105 P2d 781. **Tex**—*Cooper Petroleum Co. v La Gloria Oil & Gas Co.* (1969, Tex) 436 SW2d 889; *"Moore" Burger, Inc. v Phillips Petroleum Co.* (1972, Tex) 492 SW2d 934; *Aubrey v Workan* (1964, Tex Civ App) 384 SW2d 389, error ref n re; *21 Turtle Creek Square, Ltd. V. New York State Teachers' Retirement System* (1970, CA5 Tex) 432 F2d 64 (applying Texas law), cert den 401 US 955, 28 L.Ed.2d 239, 91 S.Ct. 975. **Utah**—*Easton v Wycoff* (1956) 4 Utah 2d 386, 295 P2d 332.

[21] **Alaska**—*Alaska Airlines, Inc. v Stephenson* (1954, CA9 Alaska) 217 F2d 295 (applying Alaska law). **Ariz**—*Trollope v Koerner* (1970) 106 Ariz 10, 470 P2d 91; *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.* (1972) 16 Ariz App 415, 493 P2d 1220, 56 ALR3d 1028. **Fla**—*Tanenbaum v Biscayne Osteopathic Hospital, Inc.* (1965, Fla App) 173 So 2d 492, ctfd ques ans (Fla) 190 So 2d 777; *Keller v Penovich* (1972, Fla App) 262 So 2d 243. **Ill**—*Sinclair v Sullivan Chevrolet Co.* (1964) 45 Ill App 2d 10, 195, NE2d 250, affd 31 Ill 2d 507, 202 NE2d 516. **NY**—*Kahn v Cecelia Co.* (1941, DC NY) 40 F Supp 878 (applying New York law). **RI**—*Heyman v Adeack Realty Co.* (1967) 102 RI 105, 228 A2d 578. **Tex**—*Cooper Petroleum Co. v La Gloria Oil & Gas Co.* (1969, Tex) 436 SW2d 889; *"Moore" Burger, Inc. v Phillips Petroleum Co.* (1972, Tex) 492 SW2d 934 (by implication); *Texarkana Constr. Co. v Alpine Constr. Specialties, Inc.* (1972, Tex Civ App) 489 SW2d 941, error ref n re; *21 Turtle Creek Square, Ltd. V. New York State Teachers' Retirement System* (1970, CA5 Tex) 432 F2d 64 (applying Texas law), cert den 401 US 955,

both viewpoints and that some cases are listed in *both categories*.

V. The Allegations Of The Second Amended Complaint Are Sufficient To Show That Defendants Had A Fiduciary Relationship With The Plaintiff And A Duty To Disclose Its Business Plans To The Plaintiff

Paragraph 14 of the Second Amended Complaint alleges as follows:

> "14. Because Brunswick had a substantial long-term commitment to Wal-mart [sic], Inc. to supply approximately two million bikes per year the exact specifications for the agreed period of production was typically not known in advance, and because the exact specifications were determined on short lead times, the price was not known in advance. The relationship, the trust and the specifications and requirements for the building of the Mexican operation to supply parts to be needed by Brunswick on short lead times was worked out in the multiple meetings between BCE and Brunswick. *In that the commitment was substantial by BCE to meet the needs of Brunswick and BCE had to perform first, by expending considerable sums to build the operation,* ***Brunswick promised the 'vender-partnership' [sic] to reflect that it was more than just a supplier relationship and that BCE could expect a special relationship of trust*** *and that the undertaking by BCE would be compensated for by Brunswick agreeing to purchase from BCE the parts needed for the production demands of 1999 (1.2 million bikes), 2000 (1.5 million bikes), and 2001 (1.8 million bikes) at a price that was agreed to be set at a higher amount than competitive with China in order to compensate for start up costs, return to capital*

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28 L.Ed.2d 239, 91 S.Ct. 975. **Utah**—*Easton v Wycoff* (1956) 4 Utah 2d 386, 295 P2d 332.

> *and profit for the first three years.* It was agreed that the price would decline for each of the three years as initial costs were recovered. After the first three years, it was agreed that BCE would still have the "vendor-partner" relationship with preference on purchasing, if the product supplied by BCE was competitive as to price and quality. It was agreed that like any partnership not every detail could be worked out in advance, so it was promised by Brunswick *that BCE could rely upon and trust Brunswick, and that after BCE built the operation and BCE could supply the parts on the short lead times, any further details could be worked out by the 'vendor-partners'.* It was agreed that Brunswick would purchase sufficient parts at a price from BCE such as to justify the investment of time, energy and capital to build the Mexican operation to meet the specific needs of Brunswick *and that at a minimum the amount purchased would be that needed to supply 1.2 million bikes in 1999, 1.5 million bikes in 2000 and 1.8 million bikes in 2001.*

Said Second Amended Complaint alleges and refers to the terms "vendor-partner," "vendor partnership," "partner," or "partnership" no less than *fourteen times*. One of the issues presented on Appeal by the Respondent was Issue No 5, which stated:

> "5. Whether Plaintiff alleged facts sufficient to find a fiduciary or confidential relationship to exist between Plaintiff and Defendant, such that Defendant had a duty to disclose its business plans to Plaintiff." [22]

Under the law of every state in the United States, a *partnership* between the opposing parties causes a fiduciary relationship to exist between the partners. *Each partner is bound to act in the utmost good faith and honesty in all deal-*

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[22] Brief on Appeal of Defendant/Appellee Brunswick Corporation, p. 2.

ings and transactions that relate to the business of the partnership. [23]

In a fiduciary relationship, a partner's *"silence alone may constitute fraudulent concealment"* [24] *of material facts.* Although the Illinois Appellate Court ruled against the Appellant on Statute of Limitations' grounds, the Illinois court indicated that plaintiff's allegations did "raise a factual issue as to whether defendant was her fiduciary in *Melko v Dionisio.* [25] This was a case where no partnership was even alleged. In a Section 2-615 motion to dismiss under Illinois law, the allegations of the Complaint are *"viewed in the light most favorable to plaintiff"* and when ruling on a section 2.615 motion to dismiss, *"the trial court should admit all well-pleaded facts as true . . ."* [26]

Having alleged that a Partnership existed between the plaintiff and defendant 14 times in the Second Amended Complaint, with proper allegations of fact, *the trial court must admit those allegations as true.* Once admitted, then the fiduciary relationship exists *as a matter of law.* Or, if it becomes a *question of fact*, then plaintiff is entitled to a jury trial as a matter of *procedural due process* on that issue.

> "The standard of review on a section 2-615 dismissal is *de novo.*" [27] . . . "The same standard of review applies to an order granting a motion to dismiss pursuant to Section 2-619(a)(7) on the basis of the statute of frauds." [28]

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[23] *Cronin v McCarthy*, 264 Ill.App.3d 514, 637 N.E.2d 668 (1994).

[24] *Chicago Park District v Kenroy, Inc.* (1980) 78 Ill.2d 555, 562-563, 37 Ill.Dec. 291, 402 N.E.2d 181.

[25] *Melko v Dionisio*, 580 N.E.2d 586, 593, 219 Ill.App.3d 1048 (1991).

[26] Brief on Appeal of Defendant/Appellee Brunswick Corporation, Standard of Review, p. 13.

[27] *Ibid.*, p. 13; See *Raintree Homes, Inc. v Village of Long Grove*, 335 Ill.App.3d 317, 319, 780 N.E.2d 773, 775 (2d Dist. 2002).

[28] *Ibid.*, p. 14; See *Prodromos v Howard Savings Bank*, 295 Ill.App.3d 470, 474, 692 N.E.2d 707, 710 (1st Dist. 1988).

Paragraph 57 of the Second Amended Complaint and portions of Paragraph 58 of said Complaint allege as follows:

> "57. BCE alleges that there was *a special relationship of trust* between BCE and Brunswick *created out of the 'vendor/partnership agreement.* Furthermore, *Brunswick had a duty to not conceal material and relevant information* as identified herein because of the partnership agreement.
>
> 58. It is alleged that [Brunswick] did knowingly *conceal* from and/or withhold from the plaintiff the facts generally stated regarding the defendant Brunswick's true level of commitment to the Mexican project which was substantially different than that communicated to plaintiff and others to get *inducement* and *reliance* on the project and to invest time, energy and money as plaintiff did *resulting in millions of dollars of losses when Brunswick exited the manufacture of bicycles . . .*"[29]

As the Illinois Supreme Court indicated in the *Chicago Park District* case,[30] *"silence alone may constitute fraudulent concealment"* of material facts as between partners and fiduciaries.

Therefore, the allegations of Paragraphs 14, 57 and 58 of the Second Amended Complaint set forth sufficient facts of a partnership, sufficient facts of a fiduciary relationship, and sufficient facts to show that defendant Brunswick Corporation "had a duty to disclose its business plans to the Plaintiff before Plaintiff had expended several million dollars on a manufacturing plant in Saltillo, Mexico, and built a new factory in Arizor, Mexico." Brunswick's Issues on Appeal, No. 5 and No. 6, must be resolved in favor of the Petitioner.

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[29] Second Amended Compalint, p. 25.

[30] *Chicago Park District v Kenroy, Inc.* (1980) 78 Ill.2d 555, 562, 563, 37 Ill.Dec. 291, 402 N.E.2d 181.

VI. *Perry v Sinderman* [31] Holds That A Constitutionally Protected Property Interest Is Clearly Established And The Due Process Rights Of The Plaintiff Are Involved As A Matter Of *"Fundamental Fairness"* Whether It Be Created Through A Statutory Entitlement, The Operation Of Institutional Common Law Or *Through Principles Of Contract Law*

> ". . . 'Property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' . . . *A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."* [32]

A. In Illinois the Statute of Frauds Does Not Bar Enforcement of an Oral Contract Where There Has Been Full or Sufficient Performance by the Parties

In *Yorkville National Bank v Schaefer*, [33] the Illinois Appellate Court said:

> "Moreover, even if, *arguendo*, the requirements of the statute were not formally met, the courts of Illinois recognize that the statute [of frauds] is not available as a defense when there is *sufficient* performance by one party in reliance upon the agreement.' (*Anastaplo v Radford* [1958], 14 Ill.2d 526, 537-8, 153 N.E.2d 37, 43.) While this performance doctrine was first developed in the context of land sales contracts, it has also been

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[31] *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[32] *Ibid.*, 33 L.Ed.2d 5.

[33] *Yorkville National Bank v Schaefer* (1979) 71 Ill.App.3d 137, 388 N.E.2d 1312.

applied in cases where an advancement of funds has been made in reliance upon a suretyship promise." [34]

In *Grundy County National Bank v Westfall*,[35] the Illinois Appellate Court said the following:

> [3-5]"The defendant strongly stresses that the case before us is one which falls within the purview of the Statute of Frauds and consequently the trial court erred in denying her motion for summary judgment. In our opinion there exists a serious question as to whether the defendant's interpretation of the Statute of Frauds is a meritorious defense since the statute has no application where there has been substantial performance on the part of one party in reliance on an agreement. See Anastaplo v Radford, 14 Ill.2d 526, 153 N.E.2d 37. The defendant cannot and does not deny that *substantial performance* in the advancement of funds to her husband was made by the plaintiff. However, for purposes of arguendo only we will assume that the loan guaranty agreement is of the genus that normally would be required to meet the requirement of the Statute of Frauds. Accepting this assumption we nevertheless do not agree that the statute constitutes a defense to the action of the plaintiff. *It is well established in our state that the courts will not permit the Statute of Frauds, the only purpose of which is to prevent fraud, to be used where the effect will be to accomplish a fraud and if the facts are such that it would be a virtual fraud to permit the defendant to interpose the statute, a court will not listen to that defense.* Wessel v Eilenberger, 2 Ill.2d 522, 119 N.E.2d 207. The trial court in the instant case in its written opinion made the observation that to permit the defendant to now rely upon the Statute of Frauds would have the effect of per-

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[34] *Ibid.*, 388 N.E.2d 1312, 1315.

[35] *Grundy County National Bank v Westfall* (1973) 13 Ill.App.3d 839, 301 N.E.2d 28.

petrating a fraud, not preventing one. With this observation we agree." [36]

B. The *Certainty* and *Uniformity* in the Application of Any Presently Existing Statute of Frauds is a *Magnificent Illusion.*[37] Whether Promissory Estoppel May Defeat the Statute of Frauds Depends . . . *Upon the Attitude of the Various Courts Toward the Statute of Frauds as Expressing a Public Policy.*[38] That lack of *Uniformity*, Among the States, Deprives the Plaintiff of Substantive Due Process in the Form of *"Liberty of Contract"*

The Fourteenth Amendment forbids any state of depriving any person of *life, liberty, or property* without due process of law.

> "For all its consequence, *due process* has never been, and perhaps never can be, precisely defined." Unlike some legal rules, this Court has said, "due process is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Cafeteria Workers v McElroy*, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 81 S.Ct. 1743. "Rather, the phrase expresses the requirement of *fundamental fairness*, a requirement whose meaning can be as opaque as its importance is lofty." [39]

In *Allgeyer v Louisiana*,[40] the legislature of Louisiana passed an act in 1894 that prohibited any person, firm or cor-

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[36] *Ibid.*, 301 N.E.2d 32.

[37] *Sunset-Sternau Food Co. v Bonzi* (1964) 60 C.2d 834, 838, fn. 3, 36 Cal.Rptr. 741, Opinion by Justice Tobriner.

[38] 56 A.L.R.3d 1037, 1052, fn. 59.

[39] *Lassiter v Dept. of Social Services of Durham County, North Carolina* (1981) 462 U.S. 18, 68 L.Ed.2d 640, 648, 101 S.Ct. 2153.

[40] *Allgeyer v Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897).

poration from issuing or procuring an insurance policy on goods located within the State of Louisiana unless the insurance company had its own agent in the state and was otherwise complying with Louisiana law. The contract of insurance was entered into in New York City.

The Supreme Court of the United States said:

> "We are not dealing with the contract. If it be legal in New York, it is valid elsewhere."
>
> * * * *
>
> "When we speak of the *liberty of contract* for insurance . . . we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract."
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> * * * *
>
> "To deprive [a person] of such a right as herein described without due process of law is illegal." . . . *"[It] is not due process of law."* [41]

Although the Illinois courts do have cases that allow the plaintiff to ignore the Statute of Frauds when there has been *substantial performance* or where there was *substantial fraud* such as the *Yorkville National Bank* case or the *Grundy County National Bank* case, [42] for the most part, Illinois is about *seventy-five years behind the times.* [43] In *Ozier v Haines*, the Supreme Court said:

> "To adopt such a view would render the Statute of Frauds useless and unmeaning. It is true that *harsh results* . . . may occur when one has *changed his position* in reliance on the oral promise of another, but it is a result which is *invited* and *risked* when the agreement is

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[41] *Ibid.*, 17 Supreme Court Reporter 427, 429, 432.

[42] See footnotes 33 and 35.

[43] "The Statute of Frauds—A Legal Anachronism,: *3 Indiana Law Journal* 437 (1928).

not reduced to writing in the manner prescribed by law . . . "[44]

England has largely repealed the Statute of Frauds.[45] The lack of uniformity in the cases within the United States has caused a serious problem. The manner in which the Illinois courts dismissed this case on the pleadings is a disgrace. The Petitioner alleged *"full performance"* and the loss of several millions of dollars. The Petitioner also alleged a Partnership and a fiduciary responsibility. Even in Illinois, a partner's *"silence alone may constitute a fraudulent concealment"*[46] of material facts. The Illinois courts did not touch this issue.

CONCLUSION

The Statute of Frauds was enacted on April 16, 1677, in Great Britain. It has been almost completely repealed in England. Yet in this country, and especially in the State of Illinois, the doctrine still remains. In every other possible jurisdiction that this lawsuit could have been filed, the Petitioner would have been successful. Here, we have a Dismissal on the pleadings when justice and equity cry out for something that would be "fundamentally fair." That is what "due process" is all about.

The Second Amended Complaint alleges that there was a "full performance," sufficient to take it out of the Statute of Frauds, even under Illinois law. In addition, the Second Amended Complaint alleges that a Partnership existed between Brunswick and the Petitioner. In every state of the Union, that means that there is a fiduciary relationship between the parties. From the pleadings, then, Brunswick had a duty to disclose its business plans to the Petitioner.

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[44] *Ozier v Haines* (1952) 411 Ill. 160, 103 N.E.2d 485, 488.

[45] See Witkin's *Summary of California Law*, Vol. I, 261; Rest.2d Contracts, Vol. 1, p. 281.

[46] *Chicago Park District v Kenroy, Inc.* (1980) 78 Ill.2d 555, 562, 563, 402 N.E.2d 181.

Finally, although the argument is not used as often as it should be, Petitioner had a "liberty of contract" under the 14th Amendment. The lack of *uniformity* among the states, and the attitude of the various courts toward the Statue of Frauds as *expressing a public policy* make it important for this Court to consider granting Petitioner a hearing for the purpose of examining the conflicting doctrines and attempting to make some sense out of the issues.

Petitioner has been deprived of procedural and substantive due process on each of the above three grounds.

Respectfully submitted,

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